IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. 85,984

SIMEON, INC., d/b/a MEGA MOVIES, and MARTIN TRAUB.

Petitioners,

vs.

DONNA COX and JUANITA ARNOLD, *et al.*

Respondents.

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Answer Brief of the Respondents

A Petition for Writ of Certiorari from an Order of the Fifth District Court of Appeal

Brief for the Respondent by:

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Statement of the Issue

I. WHETHER THE PROCEDURAL REQUIREMENTS OF SECTION 786.72 ARE CIRCUMVENTED WHEN A PUNITIVE DAMAGES PRAYER IS INCLUDED IN A SWORN COMPLAINT FILED IN THE PLAINTIFF'S INITIAL PLEADING.

Summary of Argument

Respondents' position is this: Where the claimants have within their own personal knowledge the facts upon which they base a punitive damages claim, and proffer that evidence in a sworn complaint, and the defendants contest the sufficiency of the allegations in a proceeding in which the burden is on the plaintiff to show that the allegations in the complaint present a reasonable basis for an award of punitive damages, and the court determines that the allegations are sufficient, the procedural requirements of section 786.72, Florida Statutes (1993), are met and the appellate court is without jurisdiction to review by certiorari the correctness of that decision. To hold otherwise would subject the parties and the court to unnecessary work and would not fulfill the intent of the statute.

The procedure set out above comports in full with both the language and the intent of the statute. It is nonsensical to require a plaintiff who has personal knowledge of the facts upon which a punitive damage claim is based to first file a complaint, then file an affidavit or deposition, then file an amended complaint and proceed to a hearing to determine the legal sufficiency of the claim when all of that can be avoided by filing a detailed, sworn complaint and proceeding to a hearing on a motion to strike where the plaintiff must demonstrate the legal sufficiency of the sworn allegations.

Petitioners' argument is wrong because it is based on the assumption, vigorously argued in their brief, that a defendant has a right to a "mini-trial" upon the filing of a prayer for punitive damages at which they can contest the factual basis presented by the plaintiff. A defendant has no such right; the statute only confers a right to a judicial determination whether the plaintiff has presented a prima facie case of entitlement, not a right to confront and contest the truthfulness of the evidence. That right comes at trial, not at a preliminary proceeding.

Statement of the Case and Facts

Respondents disagree with the Statement of the Case and Facts presented by the petitioners in that the statement is not "objective" or "cast in the form appropriate to the standard of review applicable to the matters presented." *Thompson v. State*, 588 So. 2d 687 (Fla. 1st DCA 1991). The statement of the facts is a continuation of the petitioners' arguments, it is written in an inappropriately argumentative tone (*i.e.*, "Despite the absence of any discovery or record evidence to support these allegations ... [Initial Brief at 1]; "The district court apparently did not consider the fact that ... [Initial Brief at 2], etc.), and should not be considered by this Court. Following is a Statement of the Case and Facts more in conformity with rule 9.210(b)(3).

On or about June 10, 1993, respondents filed a nine-count complaint alleging assault, intentional infliction of emotional distress, malicious prosecution, negligence, and other causes of action against Simeon, Inc., and Martin Traub individually. (A-3) The counts seeking damages for assault, intentional infliction of emotion distress, and malicious prosecution (Counts 1 through 5, the intentional torts) each contained a prayer for punitive damages. The respondents swore to the truth of the allegations in the complaint, which claimed that petitioner Martin Traub, the respondents' supervisor at the video store where they worked (1) threw a bar stool at respondent Donna Cox; (2) threw other items, including staplers, videotapes, cassette cases and other things at Cox; (3) screamed at Cox on a daily basis in front of other employees and customers of the store, using profanity and done in a manner calculated to humiliate her; (4) threatened to "kick [Cox's] ass" if she ever hired a fat person or a black person; screamed at respondent Arnold in the presence of employees and customers, calling her profane names, accusing her of stealing and being lazy; (5) calling the police and making a false police report against both respondents claiming thefts when he

knew that in fact they had not stolen anything, which report he ultimately abandoned; among other things.

Upon being served and before any discovery was done, the petitioners filed a motion to strike the punitive damages claim (A-21, 29), claiming failure to comply with section 768.72, Florida Statutes (1993). The motion to dismiss addressed in the petitioners' brief was addressed to the sufficiency of the allegations of the complaint, not to the punitive damages issue. The trial court denied the motions to strike (A-48).

The petitioners then filed a petition for writ of certiorari in the Fifth District Court of Appeal.

The fifth district refused to grant the writ. The court determined that this Court's ruling in *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097 (Fla. 1987), which held that certiorari was not available to review a claimed erroneous denial of a motion to strike a claim for punitive damages, was not overruled by that adoption of section 768.72, because section 768.72 allows a "proffer by the claimant" as a basis upon which to predicate the punitive damages claim. Since the "proffer by the claimant" (here, the sworn complaint) was presented to the judge before any discovery on financial worth was made, and the court determined that the proffer was sufficient, the provisions of section 768.72 were fulfilled. The fifth district disagreed with the ruling in *Kraft General Foods, Inc. v. Rosenblum*, 635 So. 2d 106 (Fla. 4th DCA) *rev. denied*, 648 So. 2d 1363 (Fla. 1994) that a judge must first determine that a factual basis for a punitive damages claim exists before the claim can be pled. Respondents then filed the instant petition.

Argument

I. WHETHER THE PROCEDURAL REQUIREMENTS OF SECTION 786.72 ARE CIRCUMVENTED WHEN A PUNITIVE DAMAGES PRAYER IS INCLUDED IN A SWORN COMPLAINT FILED IN THE PLAINTIFF'S INITIAL PLEADING.

Section 768.72, Florida Statutes (1993), states:

> In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend to his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed to allow the discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted.

The issue presented in this appeal is whether an initial sworn complaint reviewed by the trial court and found sufficient to support a claim for punitive damages complies with the provisions of the statute, or whether a plaintiff must first file his complaint then move to amend to add a claim for punitive damages upon a showing of sufficient evidence. Respondents contend that, in a case such as this where the facts that would support a punitive damages claim are fully within the personal knowledge of the claimants, it is entirely proper under both the language and intent of the statute to file a sworn initial complaint containing a prayer for punitive damages. Where, as here, the defendant in his initial pleading seeks a review of the sufficiency of that proffer, which review supports the plaintiff's right to proceed, no violation of the statute is shown.

Petitioners argue, "The legislature plainly voiced its intention to strictly limit the pursuit of punitive damages to those situations where leave of court was sought following development and presentation of evidence showing a reasonable basis for such claim," citing *Globe Newspaper Co. v. King*, 658 So. 2d 578 (Fla. 1995) (Initial brief at 6). Respondents respectfully suggest that the petitioners are misreading the statute and are reading far more into the *Globe*

Newspaper decision than was presented to this Court. In *Globe Newspaper*, this Court ruled that appellate courts have certiorari jurisdiction to determine whether the procedural requirements of section 768.72 are met, but do not have certiorari jurisdiction to review the substantive correctness of the trial court's decision. This court did not address, and the issue was not presented to the court, whether the method used by the plaintiffs here comply with the statute. The *Globe Newspaper* decision in fact is in concert with the fifth district's decision in this case, because Judge Harris' majority opinion ruled, as did this court, that certiorari will not lie to review the substantive correctness of the trial judge's ruling that the evidence presented was sufficient to support a punitive damages claim.

Respondents' position is this: Where the claimants have within their own personal knowledge the facts upon which they base a punitive damages claim, and proffer that evidence in a sworn complaint, and the defendants either do not contest the sufficiency of the allegations or, following such a contest, the court determines that the allegations are sufficient, the procedural requirements of the statute are met and the appellate court is without jurisdiction to review by certiorari the correctness of that decision. To hold otherwise would subject the parties and the court to unnecessary work and would not fulfill the intent of the statute.

The statute on its face appears to contemplate the differences between a case where the plaintiff at the time of filing knows the facts that would support a punitive damages claim, and those cases in which discovery of facts outside the plaintiff's knowledge are needed. The first sentence of the statute, by distinguishing between "a reasonable showing by evidence in the record" and evidence "proffered by the claimant" tends to show that different methods of making the showing are contemplated. Nothing can be gained by requiring, instead of a sworn, detailed complaint signed by the claimant, that the plaintiff file an

unsworn complaint accompanied, for example, by a sworn affidavit. The second and third sentences appear to contemplate those circumstances in which evidence is discovered during the litigation that would support a punitive damages claim, but perhaps was not known at its inception: "The claimant may move to amend his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages." Where the plaintiff at the inception of the case knows of the facts that would support the punitive damages claim, such provisions simply do not apply, because the plaintiff does not need to discover evidence on the issue of punitive damages; they already have it. The final sentence, "No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted" can be read as modifying the prior two sentences, or it can be read as modifying the entire section. But irrespective of how it is read, under the procedure outlined above, no financial discovery can proceed until such time as the sufficiency of the sworn evidence is tested, and the claimed sanctity of a defendant's financial worth is preserved.

Petitioners present three claimed bases for their position: (1) The "plain wording" of section 768.72 bars a punitive damages claim in the initial pleading; (2) The statute "prohibits a plaintiff from pursuing a punitive damages claim prior to the time there [*sic*] is reasonable evidentiary showing to support such claim [*sic*]"; and (3) The statute would be eviscerated by permitting the plaintiff to "merely" swear to a complaint, because the court must take the allegations as true and cannot take further evidence to contradict the foundation of the allegations. Each argument is wrong.

First, as set out above, the "plain wording" of the statute simply does not bar a punitive damages claim in the initial pleading. Respondents respectfully

suggest that we, as well as Judges Harris and Griffin of the Fifth District, can read the statute as well as they, and the interpretation we reach is at variance with that advanced by the petitioners. As set out above, the goal of the statute is to preclude the discovery of financial worth until such time as the court has the opportunity to review the sufficiency of the allegations, thereby giving a defendant protection from an indiscriminate rummaging through his financial affairs. The interpretation we present directly meets that goal and is not at variance with the statute.

Second, petitioners appear to attempt to make a distinction between a sworn complaint and a "showing of evidence." As Judge Harris put it in the majority opinion below, "But what if sufficient evidence to support a claim of punitive damages is within the personal knowledge of the plaintiff? Does section 768.72 really contemplate that the plaintiff's 'proffer' must be in response to a deposition, in answers to interrogatories, or in a filed affidavit? Why can't such a proffer be made in a sworn complaint?" The fact is that there is no rational distinction. The meat of petitioner's argument, and their answer to Judge Harris' questions, comes in their third point.

The reason that the proffer contemplated in the statute cannot be made in a sworn complaint, petitioners suggest, is because petitioners believe that they should have the opportunity to test substantively the evidence used by the plaintiffs to support their claim. Petitioner argues, "A defendant cannot challenge the plaintiff's assertions in a sworn complaint because the defendant is barred from introducing evidence to contradict the foundation and veracity of the plaintiff's 'beliefs', and therefore cannot refute the plaintiff's 'reasonable showing.'" [Initial brief at 9] That argument clearly displays the fundamental flaw of petitioner's argument. Petitioners believe they are entitled to a mini-trial before a punitive damages claim can be allowed in which they can present evidence to contradict the plaintiff's proffer, and because they believe (without

foundation) that a motion to strike cannot present them with that forum, while a motion for leave to amend can, the statute is violated.

There are two obvious errors in that argument. First, the statute simply does not confer upon a defendant the right "to contradict the foundation and veracity" of the complaint at a proceeding to permit the punitive damages claim to proceed. The statute is directly to the contrary; what is required is a "reasonable showing by evidence in the record" or evidence "proffered by the claimant which would provide a reasonable basis" for the claim. The plaintiff need not convince the judge at a mini-trial that the claim will prevail, only that the plaintiff has evidence which, if believed, will support the claim, *i.e.*, a prima facie case. Whether defendant has evidence to contradict the claim is irrelevant; that is for the jury to decide. The statute in fact sets up a system very much like that designed in the rules to permit the testing of a complaint for legal sufficiency; if the defendant believes the complaint is not sufficient, it should be presented to the judge before defendants are required to respond. Likewise, if the plaintiff can present evidence "which would provide a reasonable basis for recovery," the claim for punitive damages must be permitted.

No case law supports petitioners' claim that they are entitled to confront and contest the evidence presented by the plaintiff showing an entitlement to punitive damages. The issue is solely a legal one and requires no determination regarding the truthfulness of the claim. Judge Harris in *Simeon Inc.*, stated, "[T]he defendant should not be exposed to financial discovery until the plaintiff has properly pleaded a claim for punitive damages and has proffered evidence sufficient to create a prima facie entitlement to such damages to the satisfaction of the trial court." *Simeon, Inc. v. Cox*, 655 So. 2d at 158. That correct statement of the law in no way infers that a defendant has a right to contest the truthfulness of the allegations at a mini-trial, only that they can contest the legal sufficiency of the allegations.

The second error in petitioners' argument is that, even if the petitioners' view of the statute is correct, there is no reason to believe that they cannot present evidence contradicting plaintiff's claim at a hearing on a motion to strike. As stated above, the issue of the propriety of the punitive damages claim in the instant case was presented to the court in a motion to strike, not in a motion to dismiss, and there is no procedural reason the petitioners could not have filed counter-affidavits or otherwise attacked the veracity of the allegations to support their motion; it's just that the affidavits are irrelevant.

The heavy reliance on this misplaced view of the statute poisons petitioner's position. If a defendant is not entitled to a mini-trial where they can confront and contradict the evidence that plaintiffs proffer showing an entitlement to punitive damages, then we come back to Judge Harris' question: Why can't such a proffer be made in a sworn complaint? The answer is: It can.

It is simply nonsensical to require the filing of a complaint, the filing of a motion for leave to amend and an amended complaint, and a hearing on the motion when the same substantive result is obtained under the procedure set out above. The correct procedure should be that the plaintiffs are allowed to file an initial sworn complaint containing the allegations that they believe entitle them to punitive damages (or an unsworn complaint accompanied by sworn affidavits). If the defendant in his initial pleading chooses to contest the punitive damages claim, they move to strike it and the judge will decide before any intrusive discovery occurs whether the allegations are legally sufficient. The burden at such a hearing is fully on the plaintiff to show that the allegations "provide a reasonable basis" for the recovery of punitive damages. If defendants do not contest the claim, it proceeds. In the case where evidence supporting the punitive damages claim is not known or is not in hand at the outset, a punitive damages claim cannot be made to provide grounds for a fishing expedition, as decided in *Kraft General Foods, Inc. v. Rosenblum*, 635 So. 2d 106 (Fla. 4th DCA 1994). When that

evidence is discovered, the deposition or affidavit or interrogatories or other discovery device is presented to the judge upon a motion for leave to amend, and the judge decides if the evidence "provide[s] a reasonable basis for recovery of such damages." Such a scheme is simple, efficient, and fully comports with the statute.

Such a scheme is deficient only if by filing a punitive damages claim in a sworn complaint at the outset the plaintiff derives some procedural advantage he would otherwise not have. Petitioners try to invent such an advantage by arguing that the court must "when reviewing a motion to dismiss, ... view the allegations as true and cannot look beyond the four corners of the complaint." [Petitioners' Initial Brief at 9] This is petitioners' defective "mini-trial" argument in a nutshell. Since there is in fact no procedural advantage, petitioners' argument must fail. The only true procedural advantage gained by the plaintiff is that his claim is heard more promptly and efficaciously, which typically works to the detriment of the defense. Removing an unnecessary roadblock to a final determination on the merits, while doing what the statute intends, promotes justice.

Petitioners appear to denigrate the significance of the oath taken by the respondents upon the signing of their complaint. The oath and jurat are fully sufficient to support a prosecution for felony perjury under section 837.02, Florida Statutes (1993), in the event it is shown that respondents are lying, just as a perjury prosecution is possible if one lies in a deposition, affidavit, or other sworn article used to support a determination of the legally sufficiency of a punitive damages claim. Petitioners fail to explain why a sworn complaint is deserving of so little respect while apparently acknowledging that a deposition or other sworn statement is deserving. That failure further shows the weakness of petitioners' position.

Kraft General Foods v. Rosenblum, 635 So. 2d 106 (Fla. 4th DCA 1994), relied upon heavily by the petitioners, is not on point, because the plaintiff there argued that he should be allowed to make a punitive damages claim while he searched for evidence to justify it, a result clearly at odds with the statute and substantially different than the argument made here. The complaint in that case apparently was not sworn, thus it cannot reasonably be argued that the complaint constituted a "proffer" of evidence. But the circumstances of that case present one in which the scheme set out above reasonably should be employed. In *Kraft*, the plaintiff sued for nominal actual damages and punitive damages based on a false advertising claim. Essentially all of the facts that would support a punitive damages apparently were known to the plaintiff at the time the suit was filed, *i.e.*, that defendants were advertising that the plaintiff could save money on his next purchase but were not providing the items needed to take advantage of the offer in the present purchase. Those facts are simple and straight-forward; either they constitute false advertising under section 817.40, Florida Statutes (1993), or they do not, and either those facts are sufficient to permit an award of punitive damages under section 817.44, Florida Statutes (1993), or they are not. The plaintiff in that case argued that he should be permitted to make the punitive damages claim while he searched for the evidence to justify it, a result clearly prohibited by the statute. However, judicial economy will be preserved and the defendant's right to withhold sensitive financial data will likewise be preserved if, upon the filing of a sworn complaint alleging those facts, the defendant was obligated to move to strike the prayer and present his argument to the court with the plaintiff shouldering the burden of convincing the court that the evidence presented a "reasonable basis" for the damages before his claim could proceed to discovery.

As with many pieces of legislation implemented to "fix" perceived flaws in the civil or criminal justice systems, the legislature when implementing section

768.72 seems not to have thought through all of the ramifications. This case boils down to a simple question of procedure. We contend that we are right because the procedure we set out is simple, easy to follow, and fulfills the values the legislature seeks to impose. It allows cases to proceed more efficiently than the procedure suggested by the petitioners, while protecting the rights of the litigants. For that reason, the ruling of the Fifth District should be affirmed.

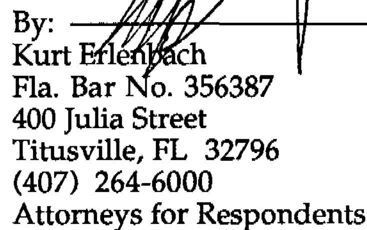
Conclusion

Respondents respectfully request that this Court deny petitioners' Petition for Writ of Certiorari and affirm the Fifth District Court of Appeal's ruling in this cause.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by U.S. Mail to Shelley H. Leinicke, One East Broward Blvd., 5th Floor, P.O. Box 14460, Ft. Lauderdale, FL, 33302, this 22 day of November, 1995.

ERLENBACH & ERLENBACH, P.A.



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